

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 15, 2006

TO: Michael McConnell, Regional Director
Region 17

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice 530-6001-5017
530-6001-5033-5000

SUBJECT: Doane Pet Care, Inc. 530-6001-5050
Case 17-CA-23307 530-6050-5000
530-6050-5075
530-6067-2060-3375
530-6067-2060-6100

This case was submitted for advice as to whether the Employer's refusal to agree to dues checkoff on "philosophical" grounds, together with other Employer conduct, established that the Employer bargained in bad faith in an attempt to frustrate the reaching of an initial collective bargaining agreement in violation of Section 8(a)(5). We conclude that the Region should dismiss this charge, absent withdrawal, because employer opposition to checkoff on "philosophical grounds" is mere evidence of bad faith bargaining, and the totality of the Employer's conduct does not indicate that it advanced and adhered to its position on checkoff in an attempt to frustrate agreement.

FACTS

Doane Pet Care, Inc. (Employer) is a manufacturer of pet food products. On October 25, 2004, UFCW Local 1000 (Union) was certified as the collective bargaining representative of around sixty production, maintenance, and sanitation employees at the Employer's Miami, Oklahoma plant. The parties commenced bargaining on an initial collective bargaining agreement in January 2005.¹ Over the course of nine months, the parties met nine times and reached agreement on over thirty subjects. During negotiations, however, the Employer and Union opposed contract provisions on dues checkoff and management rights, respectively.² In March, the Employer proposed as an alternative to checkoff a procedure whereby the Employer would inform the Union when employees are hired and fired. In April, the parties agreed to defer these unresolved non-economic issues until the conclusion of the economic portion of negotiations.

¹ All dates are in year 2005 unless otherwise indicated.

² At some point in negotiations, the Union apparently offered to exchange management rights and random drug testing for checkoff, but the Employer refused.

In September, as bargaining over economic subjects ended, the parties resumed negotiations on non-economic issues including dues checkoff. The Employer negotiator indicated that the Employer had been sold and that the new owners, a teachers union pension fund, would not agree to dues checkoff. The Union responded that other unionized Employer facilities had contractual checkoff provisions, but the Employer reiterated that this contract was the first negotiated under the new owners. Although the parties did not discuss this fact, the Employer permits employees to deduct wages for various other purposes such as for health insurance, 401(k) benefits, required safety equipment such as steel-toed boots, as well as for home and automobile insurance. At the end of this meeting, the remaining disputed issues were dues checkoff, management rights, wages, and retroactivity of wages. Both parties agreed to bargain with the assistance of a federal mediator.

After the next negotiation session in early October, the Union representative again asked why the Employer would not agree to dues checkoff while allowing it elsewhere. The Employer representative said that the new owners were "philosophically" opposed to checkoff. The Union representative then asked whether the Employer's position on checkoff related to another Employer representative's prior reference to the Union as "liars." The Employer negotiator replied that he believed that Union-affiliated persons deliberately lied before or misled the judge during testimony in a prior unfair labor practice hearing.

On October 20, the parties negotiated before a mediator. The Employer reiterated that the new owners were "philosophically" opposed to dues checkoff. The mediator suggested ending the session because the Employer was unwilling to concede on any of their previous positions on the disputed subjects. At the end of the session, the Employer presented a "final" proposal, which was the same as its prior proposal and did not include checkoff or retroactive pay. Negotiations then broke off.

The following day, the Union took the Employer's proposal to its membership, which unanimously rejected it. When the Union informed the Employer about the rejection, the Employer negotiator responded that he was meeting with Employer officials the next day and would see if they would move on their positions. That next day, October 26, the Union filed the instant unfair labor practice charge. On October 27, the Employer offered to grant retroactive pay, but not checkoff, and requested that the Union bring the contract with this concession to a revote. The Union responded that it would not resume negotiations until the rendering of a decision on the instant charge, and never presented the revised contract for a revote.

ACTION

We conclude that the Region should dismiss this charge because Employer opposition to checkoff on "philosophical grounds" is mere evidence of bad faith bargaining, and the totality of the Employer's conduct does not indicate that it advanced and adhered to its position on checkoff in an attempt to frustrate agreement.

Section 8(d) of the Act requires employers and unions to bargain in good faith with respect to wages, hours, and other terms and conditions of employment.³ Accordingly, parties have a duty to approach collective bargaining with a fair, open mind, and "a sincere purpose to find a basis of agreement" ⁴ The Board will find bad faith bargaining based on the content of lawful bargaining proposals only if the proponent's bargaining position and other proposals "indicate an intention . . . to avoid reaching an agreement."⁵ In other words, the Board will "consider whether, on the basis of objective factors, a demand [for a particular proposal or proposals] is clearly designed to frustrate agreement on a collective-bargaining contract,"⁶ or rather constitutes hard but lawful bargaining on a contract it considers desirable. The Board will not otherwise evaluate the content of particular proposals⁷ or determine whether a given proposal is acceptable or unacceptable to the opposing party.⁸

In determining whether a party bargains in good or bad faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table.⁹ As to conduct away from the table, the Board will evaluate whether a party's misconduct

³ See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-210 (1964), citing NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958).

⁴ NLRB v. Herman Sausage Co., 275 F.2d 229, 231, rehearing denied 277 F.2d 793 (5th Cir. 1960).

⁵ Litton Systems, 300 NLRB 324, 326-327 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); see also A-1 King Size Sandwiches, 265 NLRB 850, 859 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); Reichhold Chemicals, 288 NLRB 69, 69 (1988), enfd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

⁶ Ibid.

⁷ See Litton Systems, 300 NLRB at 326-27.

⁸ See Reichhold Chemicals, 288 NLRB at 69.

⁹ See, e.g., Public Service Co. of Oklahoma, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003).

"sheds light" on its bargaining position.¹⁰ "[W]ithout evidence that the party's misconduct at the bargaining table itself indicates [the absence of] an intent to reach agreement it has not been held to provide an independent basis to find bad faith bargaining."¹¹ Misconduct away from the bargaining table should also relate or have a nexus to a party's conduct at the table to be considered evidence of bad faith bargaining.¹²

The Board has applied these principles to alleged bad faith bargaining over dues checkoff where employers have opposed checkoff based on "philosophical" grounds.¹³ The Board has found philosophical opposition to be evidence both that an employer has bargained with a bad faith intention not to reach agreement,¹⁴ and

¹⁰ See Hedaya Bros., Inc., 277 NLRB 942, 945 (1985) (employer representative told employees that the employer would rather close than deal with a union and that it would not sign a contract or negotiate with a union, supporting 8(a)(5) bad faith bargaining violation); Oldfield Tire Sales, 221 NLRB 1275, 1276 (1975) (employer failed to bargain in good faith in violation of Section 8(a)(5), noting employer's statement that he intended to neither recognize nor negotiate with the union; this statement shed "considerable light ... on [the employer's] attitude toward both bargaining and [its] prospective relationship with the [u]nion").

¹¹ Litton Systems, 300 NLRB at 330; see also O'Reilly Enterprises, 314 NLRB 378, 378 (1994) (notwithstanding employer president's coercive acts making it clear to unit employees that she wanted to get rid of the union, no intent to frustrate agreement where employer's conduct at the table indicated a willingness to compromise to achieve an agreement; such compromise included concessions to the union, as well as a statement that it would continue bargaining, at the final bargaining session).

¹² See M.K. Morse Co., Case 8-CA-23792, Advice Memorandum dated Nov. 1, 1991, at 1991 WL 250954 (none of the employer's numerous acts of unremedied misconduct, which included unlawful interrogations, disciplinary acts and unilateral changes, was related to the employer's bargaining position; for example, the unilateral change involving a vacation policy was not an issue in controversy at the bargaining table and the employer's statements during interrogations shed no light on its future bargaining position).

¹³ See, e.g., CJC Holdings, 320 NLRB 1041, 1046-47 (1996) (employer asserted a "philosophical" objection to dues checkoff because it did not wish to engage in the business of collection of dues); H.K. Porter Co., 153 NLRB 1370, 1373 (1965), *enfd.* 363 F.2d 272 (D.C. Cir.), *cert. denied* 385 U.S. 851 (1966) (employer withheld dues checkoff, not wanting to aid the union, since it viewed collecting dues as "union business").

that an employer has entered into negotiations with its mind sealed against any compromise.¹⁵ However, an employer's "philosophical" opposition to checkoff, standing alone, does not amount to a Section 8(a)(5) violation without other evidence of bad faith.

In Phelps Dodge Specialty Copper Products, the employer refused to agree to union security or dues checkoff clauses due to a "philosophical" disagreement with the union on those subjects. Specifically, the employer told the union that it believed that employees should have the right to choose to be members or nonmembers, and that it did not want to be forced to discharge employees who failed to pay dues.¹⁶ The ALJ, with Board approval, found no bad faith bargaining in the absence of any other bargaining misconduct and in light of the Employer's overall good faith bargaining.¹⁷ The ALJ noted an employer's "philosophical"

¹⁴ See Chester County Hospital, 320 NLRB 604, 622 (1995), enfd. 116 F.3d 469 (3d Cir. 1997) (employer's adherence to position that its "philosophy" was that unit employees should decide whether to join the union, and that the union should be responsible for collecting dues, showed that the company entered negotiations with a fixed intent not to agree to either and further evidenced overall bad faith bargaining).

¹⁵ See Preterm, Inc., 240 NLRB 654, 673 (1979), enfd. 784 F.2d 426 (1st Cir. 1986) (refusal to discuss checkoff or any modified form thereof based on a "philosophical opposition" is evidence of a refusal to confer in good faith).

¹⁶ 337 NLRB 455, 455 (2002).

¹⁷ See *id.* at 455 & 457 (fact that the employer explained its position, which was not irrational and was supported by the evidence, supported finding that employer engaged in good faith bargaining); see also 88 Transit Lines, Inc., 300 NLRB 177, 178 & 185-86 (1990), enfd. 949 F.2d 598 (3d Cir. 1991) (employer's refusal to agree to or even discuss union security or checkoff based on a "philosophical" opposition was an insufficient manifestation of an intent to avoid agreement given the employer's good faith movement on positions and reaching of agreement on several other subjects); Tritac Corp., 286 NLRB 522, 522-23 & n.5 (1987) (despite employer's refusal to accede to union's position on checkoff and other issues, no bad faith bargaining given employer's continuous willingness to negotiate with the union and substantial progress made by the parties in negotiations, which included reaching agreement on numerous subjects and discussing those subjects on which the parties did not agree); American Coal Co., 164 NLRB 36 (1967) (employer's opposition to checkoff based on belief that professional employees should not be unionized and not wanting to render assistance to the union, not illegitimate or intended to frustrate agreement, particularly where employer otherwise bargained in good faith by regularly agreeing to meet

opposition to checkoff is generally "a significantly smaller part of the whole" of an employer's bad faith bargaining.¹⁸

Where an employer's "philosophical" opposition to dues checkoff or union security is adduced as evidence of bad faith bargaining, the Board also considers whether the employer has agreed to those provisions at its other facilities,¹⁹ and whether the employer has discriminatorily refused to permit payroll deductions to a union while allowing them to other, private entities.²⁰ However, even when these factors were present, where an employer has otherwise bargained in good faith, the Board has not concluded that its refusal to accept dues checkoff was an attempt to frustrate agreement.²¹

with the union and making concessions on subjects other than checkoff, which was the only issue foreclosing agreement).

¹⁸ See *id.* at 456, comparing, for example, Langston Cos., 304 NLRB 1022, 1050 (1991) (employer, among other things, refused to negotiate at all until certain unfair labor practice allegations were resolved, and directly dealt with employees).

¹⁹ See Carbonex Coal Co., 248 NLRB 779, 800 (1980), *enfd.* 679 F.2d 200 (10th Cir. 1992) (entire course of conduct constituted surface bargaining and showed no intent to reach agreement; one of several pieces of evidence supporting this conclusion was the employer's refusal on philosophical grounds to agree to union security while agreeing to it at another facility).

²⁰ See Atlas Metal Parts Co., 252 NLRB 205, 220 (1980), *enf. denied* in pertinent part 660 F.2d 304 (7th Cir. 1981) (the "discriminatory inconsistency" of denying dues deduction for union, but allowing for other purposes belies any assertion of good faith). The Board considers as evidence of discrimination the deduction of employee pay for private purposes, but not for deductions for employee fringe benefits "integrally related to an employer's necessary business functions." Compare Exxon Shipping Co., 302 NLRB 290, 292 (1991) (deductions to brokerage firms and for payment of loans, taxes and alimony, private in nature and evidence of discrimination), with Woodland Clinic, 331 NLRB 735, 739 (2000) (payroll deductions for employee health and pension trust funds and employee 401(k) plans are "intimately related to" employer fringe benefits it offers to employees, and are not evidence of discrimination against the union).

²¹ See Litton Systems, 300 NLRB at 404-05 (ALJ found bad faith bargaining based, in part, on the employer's claim that checkoff was "union business," especially because deductions were made for other purposes such as stocks, bonds, and credit unions; without discussing the discriminatory deduction of dues, Board found no bad faith bargaining because the employer otherwise bargained in good faith on checkoff); Tritac Corp., 286 NLRB at 522-23, 544 (ALJ

Here, the Employer specifically relied on the new owners' "philosophical" opposition to dues checkoff, allowed deductions of employee pay for other purposes, as well as allowed dues deductions at other facilities. Despite this evidence of bad faith bargaining, we conclude that the Employer's overall conduct was in good faith and that the Employer did not use bargaining over checkoff as a means of frustrating agreement.

First, the Employer engaged in no conduct away from the bargaining table that "shed light" on any arguable bad faith conduct in negotiations. The comment by the Employer negotiator that the Union and its supporters were "liars" had no nexus or relation to bargaining and was elicited in response to the Union negotiator's question.²² Second, at the bargaining table, the Employer did not engage in dilatory tactics or refuse to furnish relevant information. To the contrary, The Employer bargained in good faith on other subjects, and the parties have reached agreement on over thirty provisions.

Most importantly, there is affirmative evidence that the Employer engaged in good faith bargaining when the Union announced an end to the negotiations because it had filed this charge. On October 27, the Employer not only sought to continue bargaining after the Union membership rejected its contract offer, but also offered a major concession in an effort to reach an agreement. The Employer acceded to the Union's position on retroactive pay, one of the few remaining key issues in dispute between the parties. The Union refused to discuss this concession, refused to bring the revised contract to the Union membership, and declined further negotiations. The parties' inability to reach agreement cannot be attributed solely to the Employer. The Union also appeared to have an equally "fixed and adamant attitude" to include checkoff in the contrast. Although the Union offered management rights, it offered no viable alternative to checkoff itself.²³

found bad faith bargaining relying in part on the employer's refusal to agree to checkoff because it did not want to collect the union's money, and particularly because the employer had agreed to the same clause with the union at another plant; Board reversed because the totality of the circumstances, which included the employer's continuous willingness to negotiate with the union and the substantial progress made, showed that the employer's conduct was not calculated to impede negotiations).

²² See 88 Transit Lines, Inc., 300 NLRB at 178 (employer representative's comment that bargaining was a waste of time was not a response to bargaining generally, but the result of a momentary pique at what was viewed as a demand by the union to agree to the union's entire proposal).

²³ See Raysbestos-Manhattan, Inc., 169 NLRB 396 (1967).

Finally, we recognize that the Employer did not elucidate its position during negotiations on its "philosophical" opposition to checkoff.²⁴ However, its perfunctory position was outweighed by other conduct indicating a good faith attempt to reach agreement, including its agreement on numerous other subjects and in particular its concession on retroactive wages the day after the Union filed the instant charge and refused further negotiations.²⁵

In accordance with the above, we conclude that the Region should dismiss, absent withdrawal, the instant 8(a)(5) charge alleging that the Employer bargained in bad faith.

B.J.K.

²⁴ Compare Phelps Dodge Specialty Copper Products, 337 NLRB at 456-57 (employer bargained in good faith, in part because it explained to the union that it had been forced to discharge employees who failed to pay dues and had mistakenly discharged an employee for failure to pay dues, which it now wanted to avoid).

²⁵ See 88 Transit Lines, Inc., supra note 19; see also Tritac Corp., 286 NLRB at 523 & 544 (no attempt to frustrate agreement because of substantial progress made on numerous subjects and employer's willingness to discuss other subjects; employer had rejected checkoff stating only that it did not want to collect the union's money). But see Chester County Hospital, 320 NLRB at 623 (employer's adamant opposition to checkoff and union security based on vague or generalized "philosophical" grounds supports finding of bad faith, which was premised on the employer's overall course of conduct including its unlawful efforts to isolate union employees and insulate the unorganized employees from unionization).